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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-521

DR. JOHN YIAMOUYIANNIS
Petitioner,
v.
CHEMICAL ABSTRACTS SERVICE, et al.
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

ARTHUR B. HANSON
WILLIAM J. BUTLER, JR.
FRANK M. NORTHAM
HANSON, O'BRIEN, BIRNEY
AND BUTLER
888 Seventeenth Street, N. W.
Washington, D. C. 20006

BRUCE G. LYNN
MICHAEL J. RENNER
BRICKER, EVATT, BARTON & ECKLER
100 East Broad Street
Columbus, Ohio 43215

Attorneys for Respondents

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OPINION BELOW

The opinion delivered in the court below is not as yet officially reported but is appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

While Respondents disagree with the conclusion of the United States Court of Appeals for the Sixth Circuit that a right of action exists directly under the First Amendment, *Yiamouyiannis* v. *Chemical Abstracts Service*, 521 F.2d 1392 (6th Cir. 1975), the only question of which review can properly be sought through the instant Petition is: whether the fact that Congress has granted a federal charter to an organization, otherwise private in character, renders the actions of the officers of such an organization "state action."

STATEMENT OF THE CASE

Respondents accept Petitioner's statement of the case as substantially correct except the statement that the American Chemical Society is "a corporation *established* by Act of Congress." Respondents disagree in so far as that statement would seem to imply that 50 Stat.L. 798, passed in 1937 by Congress, "established" the American Chemical Society. The American Chemical Society had existed since 1876 as a private "corporation existing under the laws of the State of New York," 50 Stat.L. 798, Chapter 762, prior to receiving a federal charter in 1937.

ARGUMENT

The Respondent, Chemical Abstracts Service, is a division of the American Chemical Society, a private, non-profit corporation the purposes of which are: "to encourage . . . the advancement of chemistry in all its branches; the promotion of

research in chemical science and industry; the improvement of the qualifications and usefulness of chemists . . . ; the increase and diffusion of chemical knowledge; and . . . to promote scientific interests and inquiry . . . ." The American Chemical Society had existed, as a New York corporation, since 1876 prior to receiving its federal charter in 1937.

Petitioner maintains that since the American Chemical Society was chartered by Congress, *ipso facto*, the actions of the Society's corporate officers constitute "governmental" or "state action." This assertion ignores the recognized standards established in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), *Moose Lodge No. 17* v. *Irvis*, 407 U.S. 163 (1972) and *Jackson* v. *Metropolitan Edison Company*, 419 U.S. 345 (1974), for determining the existence *vel non* of sufficient governmental involvement with a private entity so as to convert the private entities actions into "governmental action."

Ignoring the detailed analysis and careful reasoning contained in those cases, Petitioner attempts to reduce their holdings to an overly simplistic test under which a court need only determine whether the entity involved is "public" or private. According to Petitioner, the distinguishing factor in *Burton* and *Moose Lodge* was that in *Moose Lodge* the corporation was private and in *Burton* the corporation was "public." (Petition at 16). Petitioner conveniently overlooks the fact that in *Burton* the questions as to "state action" arose only because it was a private entity, which leased space from a "public" corporation, that was engaging in discriminatory activity.

Having formulated the simplistic test of "public" corporation versus private corporation, Petitioner contends that the American Chemical Society is a "public" corporation solely by virtue of its federal charter. While Petitioner attempts to buttress this argument through reference to *Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819) and *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), those cases and the issues addressed in them provide no guidance in regard to the question of "state action." In *M'Culloch* v. *Maryland, supra*, this

Court held that the states may not tax federal instrumentalities which have been created to carry out governmental functions in furtherance of the federal government's constitutional power to enact such laws as are necessary and proper to enable the government to execute its powers. The American Chemical Society was not federally chartered in order that it might execute governmental functions, nor does it execute any such functions. Further, the American Chemical Society is not immune from taxation. The Society has been granted certain tax exemptions since, as a scientific and educational institution, it qualifies for exemption under 26 USC §501(c)(3), but it remains liable for taxes on its unrelated business income and on such of its properties as are not used in connection with its educational and scientific purposes.

Petitioner's reliance on *Dartmouth College* v. *Woodward, supra,* is similarly misplaced. Despite the language quoted by Petitioner (Petition at 12-13), this Court made it clear that mere incorporation of an entity will not change its character. Just as the American Chemical Society, Dartmouth College had existed prior to its receiving a charter, and, as the Court stated:

> "From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. . . . [T]he incorporating act [cannot] change the character of a private eleemosynary institution."

17 U.S. at 638-39.

As was pointed out by the United States Court of Appeals for the Sixth Circuit in *Blackburn* v. *Fisk University,* 443 F.2d 121, 123 (6th Cir. 1971): "State involvement sufficient to transform a 'private' university into a 'State' university requires more than merely chartering the university," (citing *Dartmouth College, supra*). See also, *Sament* v. *Hahnemann Medical College & Hospital,* 413 F.Supp 434, 439, (E.D.Pa. 1976), *aff'd.,* 547 F.2d 1164 (3rd Cir. 1977); *Greenya* v. *George Washington University,* 512 F.2d 556, 559 (D.C.Cir. 1975).

In no case has this or any other court held that the mere grant of a federal or state charter to an otherwise private institution converts the actions of that institution's officials into "state action." The Petitioner has failed to cite any such authority. Instead, Petitioner presents this Court with the example of the Veterans of Foreign Wars (VFW), a federally chartered association, and urges that discriminatory action engaged in by the VFW would constitute "state action" due to the VFW's "contacts" with the federal government.

Respondents are somewhat nonplused by this argument inasmuch as the Sixth Circuit specifically referred to *Stearns* v. *Veterans of Foreign Wars,* 394 F.Supp. 138 (D.D.C. 1975), *aff'd,* 527 F.2d 1387 (D.C.Cir.), *cert. denied,* 429 U.S. 822 (1976) in rendering the decision forming the basis for the instant Petition for Certiorari. *Stearns* is on all fours with the instant case and, there, the court flatly rejected the argument that a federal charter automatically converted the actions of an institution into "state action."

Although *Stearns* involved a claim of sex discrimination, rather than a First Amendment claim, the legal issues posed and resolved are identical to those in the instant case. In *Stearns,* the plaintiff asserted that the VFW's membership limitation, restricting its membership to males meeting certain military service requirements, was violative of the equal protection guarantee in the due process clause of the Fifth Amendment. Her initial pleadings contended that, by virtue of the fact that the VFW has a federal charter, there is the kind of significant governmental involvement which constitutes "state action." On cross motions, both of which were considered as motions for summary judgment, the district court granted judgment to the VFW. On appeal, the plaintiff argued, for the first time, that the involvement of the government with VFW went beyond mere chartering.

The United States Court of Appeals for the District of Columbia Circuit, while noting that it tended to agree that federal chartering alone did not give rise to "state action,"

reversed and remanded in order that the plaintiff might produce evidence of further government involvement sufficient to overcome a motion for summary judgment. *Stearns* v. *Veterans of Foreign Wars,* 500 F.2d 788 (D.C.Cir. 1974).

On remand and after discovery, the district court again considered cross motions for summary judgment and, once more, rendered judgment for the defendant, stating:

> "Having sifted the facts and weighed the circumstances herein, the Court finds itself unpersuaded that the government is in any way significantly involved with the exclusionary membership policy of the VFW."

394 F.Supp. at 138. On appeal from the court's second order, the judgment was affirmed without opinion, 527 F.2d 1387 (D.C.Cir.) and certiorari was denied, 429 U.S. 822 (1976).

Contrary to the method advocated by Petitioner (*i.e.,* to inquire only as to whether the entity is "public" or "private"), the court in *Stearns* engaged in the "sifting of acts and weighing circumstances" required by this Court. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

In the case of *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345 (1974), this Court reaffirmed the principle that the determination of state involvement must be based on a particularized inquiry focusing on whether there is:

> " . . . a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."

419 U.S. at 351. This Court declined to find that such a "close nexus" existed in that case where the facts disclosed that a public utility furnishing electricity had been granted a partial monopoly by the State and that it was subject to a form of extensive governmental regulation by the State in a way most other businesses were not.

In order to establish "state action," not only must it be shown that there is a symbiotic relationship between the defendant and the federal government, but also it must be shown that the government was involved in the allegedly injurious activity. "[T]he essential point [is] that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury." *Powe* v. *Miles,* 407 F.2d 73, 81 (2d Cir. 1968). Petitioner herein failed to produce sufficient evidence to establish "state action" as to either of these conjunctive standards.

The district court "sifted the facts and weighed circumstances" as to the asserted connections between the American Chemical Society and the federal government and concluded that the federal charter, receipt of public funds, granting of tax exemptions, and the obligation to make annual reports to Congress failed to create the necessary significant involvement between the government and the American Chemical Society. (Appendix to Petition at 25a-27a). This is in accord with the settled decisional authority. See, *e.g., Stearns* v. *Veterans of Foreign Wars, supra; Sanford* v. *Howard University,* 415 F.Supp. 23 (D.D.C. 1976), *aff'd.* 549 F.2d 830 (D.C.Cir. 1977); *Blackburn* v. *Fisk University,* 443 F.2d 121 (6th Cir. 1971); *Brown* v. *Mitchell,* 409 F.2d 593 (10th Cir. 1969) and cases cited therein.

The district court also found that the evidence submitted by the plaintiff failed to show any involvement by the federal government in the alleged actions giving rise to his claim and, therefore, as a matter of law there was no "state action." (Appendix to Petition at 27a).

The district court having so found and concluded, the only issue presented for review to the Court of Appeals was whether a federal charter, standing alone, constitutes sufficient involvement with the federal government to render the actions of the officers of the American Chemical Society "state action." As

has been previously discussed, the Court of Appeals correctly held that a chartering by Congress is insufficient to establish "state action."

CONCLUSION

This Court has recognized the clear distinction between the operation of constitutional guarantees on "private" conduct and "state" action. In *Jackson* v. *Metropolitan Edison Company, supra,* the Court stated:

> "The Due Process Clause of the Fourteenth Amendment provides 'nor shall any State deprive any person of life, liberty, or property, without due process of law.' In 1883, this Court in The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, affirmed the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory and wrongful,' against which the Fourteenth Amendment offers no shield. *Shelley* v. *Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948)."

The American Chemical Society is a private, non-profit, membership corporation, and it is submitted that this corporation cannot be said to have engaged in activities which were the result of "governmental action" or were authorized, fostered or mandated by the federal government. Petitioner's having failed to establish the action of Respondents as "governmental," it is unnecessary to consider the issue as to the availability of relief directly under the First Amendment.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in this case should be denied.

Respectfully submitted,

ARTHUR B. HANSON
WILLIAM J. BUTLER, JR.
FRANK M. NORTHAM
HANSON, O'BRIEN, BIRNEY
AND BUTLER
888 Seventeenth Street, N. W.
Washington, D. C. 20006

BRUCE G. LYNN
MICHAEL J. RENNER
BRICKER, EVATT, BARTON & ECKLER
100 East Broad Street
Columbus, Ohio 43215

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